to give some support to the surviving spouse even if the deceased lost the property unwillingly. But the statute has no relevancy to involuntarily transferred property if the legislative purpose was to give to the wife an element of control over the husband's property, or, more important, if it was to prevent the husband from deliberately depriving his wife of her distributive share by conveying away his real property before death. Thus in the principal case there is doubt as to whether inchoate dower should have been recognized at all, although by the best precedent the wife was so entitled.

If inchoate dower is to be allowed, however, the Bowditch Table should no longer be used for valuation, inasmuch as there is no present basis for its assumption that dower is certain to attach provided the wife survives the husband. Since 1932, with dower abolished in all lands of which the owner died seized, there is now no such certainty; and if the owner had not been forced to convey his property by order of the court, there is at least the possibility that he would have kept it until his death. Granted that the possibility of the owner's not disposing of his property cannot be figured on an actuarial basis, yet it must be conceded that the new uncertainty added by the 1932 statutory change in policy should somewhat lessen the value of inchoate dower. There is no evidence that the court considered this in setting the amount of the award in the principal case. W. N. P.

SALES

Sales—Effect of Repossession for a Special Purpose By the Seller Upon a Subsequent Mortgage

The plaintiff purchased a new Hudson automobile from a dealer and agreed to pay for it by trading in his old car and giving a check to cover the balance. After using the car a day or two the plaintiff returned it to the dealer to have a new clutch installed. It was necessary for the dealer to send to the factory for the new part. Pending completion of the repairs the plaintiff temporarily stopped payment of the check. Several weeks later the dealer mortgaged the car to the defendant finance company whose agents secured possession in some manner and placed it in the defendant's garage.[1] The plaintiff brought an action of replevin for the car. The trial court

[1] Both the Eastbourne Garage, Inc. and the C. I. T. Corp. were joined as defendants in this action.

found that there was an agreement[2] between the plaintiff and the dealer to treat the check as absolute payment[3] and that it was in no way affected by the temporary stoppage of payment since it was only a means of protecting the plaintiff's interests and was in no way a dishonor. Judgment was for the plaintiff in the lower court and the defendant finance company appealed. *Held:* Affirmed. Ohio G. C. Sec. 8405 (Section 25 of the Uniform Sales Act) was inapplicable because the car was actually delivered to the purchaser and then returned to the vendor for the purpose of repair.[4] *Schafstall* v. *The Eastbourne Garage, Inc.*, 65 Ohio App. 481, 30 N. E. (2d) 571 (Court of Appeals, Hamilton County, 1940).

Ohio G. C. Sec. 8405 provides where one purchases goods and the vendor continues in possession, a subsequent transfer of the goods by the vendor to any person receiving and paying value for the same goods in good faith and without notice of the previous sale will have the same effect as if the vendee had expressly authorized the vendor to do so.[5] The rule is based on the theory that a vendee who allows this to happen is guilty of constructive, if not actual, fraud and therefore a subsequent transferee in good faith should be protected.[6] However, as the court pointed out, the section applies only to those situations where the vendor continues in possession. The court did not discuss the period of time during which a vendee must have possession which in this case was at best only one or two days. The common law rule required such a change of possession

[2] The record only shows that the plaintiff asked the dealer "whether he would accept my check in payment for the car" and the dealer said "yes".

[3] Ordinarily a check is considered as only a conditional payment of a debt, but if the parties so desire they may stipulate otherwise by express agreement. *See*: Way v. Mooers, 135 Minn. 339, 160 N. W. 1014 (1917); Wheeler v. Kitchen, 67 Okla. 131, 169 Pac. 877 (1917); Strong v. King, 35 Ill. 9, 85 Am. Dec. 336 (1864).

[4] There was no problem of constructive notice of the sale to the finance company by reason of the bill of sale, because it was not recorded by the dealer as he had agreed to do.

[5] This section of the General Code follows the common law. *See* Jewett v. Lincoln, 14 Me. 116, 31 Am. Dec. 36 (1836); Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 57 (1867); Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119 (1821); The Hallet & Davis Piano Co. v. The Starr Piano Co., 85 Ohio St. 196, 97 N. E. 377 (1911). *See* Shaddon v. Knott, 2 Swan (Tenn.) 358, 58 Am. Dec. 63 (1852) to the effect that continuance in possession is only prima facie evidence of fraud. Also Meade v. Smith, 16 Conn. 346 (1844).

[6] While the defendant finance company could have argued Section 26 of the Sales Act, since it also could qualify as a creditor, it did not do so for the obvious reason that the effect of Section 25 is to make retention of possession by the seller conclusive evidence of fraud, whereas under Section 2b if the vendor continues in possession of the goods a creditor of the vendor may treat the sale as void only if such retention of possession is fraudulent in fact or under any rule of law.

as would "give notice to the world" of the change in ownership.[7] This same result has been reached under the Sales Act.[8] It is not quite clear whether the court felt that formal compliance alone was enough to satisfy the requirement of delivery or that it was also necessary for the vendee to retain possession in good faith for a period reasonable under the circumstances. The latter construction is to be preferred since it closes the door to fraudulent practices. While it is true in general "prior in time is prior in right" and a statutory modification of that principle should probably be strictly construed, such construction should not be so strict as to protect the prior vendee where the change in possession has been purely nominal. Some courts have required a longer period of possession by the vendee.[9] These decisions are in accord with the general rule that a mere formal delivery followed by a return to the vendor is not sufficient to remove the presumption of fraud. These cases require a more substantial period of possession by the vendee. These cases are not in conflict and can be reconciled.[10] The general proposition is that there must be more than a formal change in possession. It must be real and substantial. The variance in the cases is not because different rules of law were applied, but because of different

[7] Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500 (1860); White v. O'Brien, 61 Conn. 34, 23 Atl. 751 (1891); Brown v. Riley, 22 Ill. 46 (1859); Deere & Co. v. Needles, 65 Iowa 101, 21 N. W. 203 (1884); Reynolds v. Beck, 108 Mo. App. 188, 83 S. W. 292 (1904); Brady v. Haines, 18 Pa. 113 (1851).

[8] In the case of *Bauer* v. *The Commercial Credit Corp.*, 163 Wash. 210, 300 Pac. 1049 (1931) where section 25 of the Sales Act was argued, the court said that possession by the vendee for only a few weeks was sufficient to give notice to the world even though the car was returned for the purpose of resale. The same result was reached under section 26 of the Sales Act in *Foss* v. *Towne*, 98 Vt. 321, 127 Atl. 294 (1925).

Section 74 of the Sales Act provides that the Act shall be interpreted so as to make uniform the laws of those states adopting it. *See*: Huchinson v. Renner, 28 Ohio App. 22, 162 N. E. 451 (1928) and Stewart v. Hansen, 62 Utah 281, 218 Pac. 959 (1923).

[9] Richardson v. Woodring, 74 Iowa 149, 37 N. W. 122 (1887) a period of several months possession by the vendee was not sufficient; Weeks v. Wead, 2 Aik. (Vt.) 64 (1826) a ten day period was insufficient; Van Pelt v. Littler, 10 Cal. 394 (1858) period of several days not sufficient; Norton v. Doolittle, 32 Conn. 405 (1865) a vendee in possession only two days before return to the vendor couldn't recover.

[10] In *Richardson* v. *Woodring*, note 9 *supra*, a stock of goods in a furniture store was sold to a mine operator who knew at the time that the goods were subject to a chattel mortgage. The vendee took possession of the store and the goods therein, but after several months possession, gave the possession and the control back to the vendor. In *Weeks* v. *Wead*, note 9 *supra*, a horse was sold by a judgment debtor to *W* who retained possession for a period of eight or ten days, during which time the vendor received part of the benefits. The horse was then returned to the vendor who used it as his own. In *Van Pelt* v. *Littler*, note 9 *supra*, *F* sold his stock of goods and leased his store to *V* who took possession and ran the business for a few days. *V* then gave control and possession back to the vendor. In *Norton* v. *Doolittle*, note 9 *supra*, *A* sold cattle to *B* who had possession for two days and then leased them back to *A* who used them as he had previous to the sale.

fact situations. Events leading up to the transaction and subsequent thereto are all important in deciding cases of this type. Under the circumstances presented in the principal case it does not seem unreasonable to say that a day or two is sufficient period of possession in the vendee so as to give "notice to the world."

Had the facts of this case arisen a few months later the result would have been determined by the Certificate of Title law which did not become effective until January 1, 1939.[11] However, since that law is applicable only to motor vehicles the question is still open where the sale of other chattels is involved. While the case is weak and indecisive on some points, it would seem that the interpretation given in the principal case of Section 25 of the Sales Act is correct.

G. O. A.

STATUTORY INTERPRETATION

Statutory Tort Liability under Motor Vehicle Laws—Equivocal Language in Relation to Public Corporations

Plaintiff, as administrator, brought an action against a board of county commissioners for the death of his decedent. Death resulted from the negligent operation of a motor truck by an employee of the defendant while driving the truck to its final destination from the place of technical delivery. Jury trial resulted in a verdict for plaintiff, but the court entered judgment *non obstante verdicto.* On appeal *held,* reversed, liability being predicated upon the Michigan Motor Vehicle Statute [1] which makes the owners of "motor vehicles" liable for injuries occasioned by their negligent operation. *Miller* v. *County Bd. of Road Comm'rs,* 297 Mich. 487, 298 N. W. 105 (1941).

Defendant's immunity was conceded under the common-law rule of non-liability in the exercise of governmental functions. The issue in the principal case was, therefore, solely as to whether the Michigan legislature intended in the adoption of its motor vehicle legislation to subject municipal and public quasi-corporations to responsibility for tortious conduct in the operation of their vehicles. As the law

[11] Ohio G. C. Sec. 6290-2 *et seq.*

[1] Mich. Stat. Ann. (Henderson, 1937) §9. 1431 (definition of "motor vehicle"), 9. 1446 (statutory liability for negligent operation).